

The European Constitution and the Relation between European and Member State Powers

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Whereas the future of the European Constitution is still uncertain, the separation of powers between the EU institutions as well as between the Union and its Member States remains a crucial issue. The question whether the “Constitutional Treaty” forms a constitution can be answered positively if the term “constitution” is understood in a broader sense. The European Constitution reemphasises the existing superiority of the EU legal order to national law, but does not essentially alter the complex relationships with the Member States’ constitutions. On the vertical axis of the institutional balance, it elucidates the different kinds of competencies that evolved from the ECJ case-law and strengthens the principles of subsidiarity and proportionality. On the horizontal axis, it clarifies the dividing lines between legislation, administration, and the dispensation of justice.

Auch angesichts der unklaren Zukunft der Europäischen Verfassung bleibt das Problem der Gewaltenteilung sowohl zwischen den Unionsorganen als auch zwischen der EU und ihren Mitgliedstaaten aktuell. Zunächst lässt sich die Frage, ob der „Verfassungsvertrag“ überhaupt eine Verfassung ist, positiv beantworten, wenn man von einem breiteren Verständnis des Begriffs ausgeht. Die Europäische Verfassung betont den Vorrang des Europarechts vor den nationalen Rechtsordnungen, ändert jedoch das komplexe Verhältnis zu den mitgliedstaatlichen Verfassungen nicht wesentlich. Auf der vertikalen Dimension des institutionellen Gleichgewichts werden die aus dem Richterrecht des EuGH entwickelten Kompetenzkategorien festgehalten und die Prinzipien der Subsidiarität und der Verhältnismäßigkeit gestärkt. Horizontal wird die Unterscheidung zwischen den Aufgaben der Gesetzgebung, der Verwaltung und der Rechtsprechung klarer herausgearbeitet.

I. Introduction and Apology

After the French and Dutch “no” votes, obituaries of all sizes and shapes emerged to commemorate the Treaty establishing a Constitution for Europe (hereinafter: European Constitution). Although the current status quo is officially a “reflection period”, extended until June 2007,¹ the resurrection of the constitutional project

¹ The original deadline for the reflection period passed in June 2006. During the EU summit of 15. 06. 2006, the European leaders decided – due to the lack of agreement on workable solutions to resolve the constitutional crisis – to extend the reflection period until June 2007.

in its present form is at most uncertain. Nonetheless, this contribution will tackle the separation of powers under the European Constitution, for a number of reasons. It is still fruitful, certainly from a constitutional law point of view, to examine the ideas and solutions that came to the fore in what remains a unique constitutional project. This is all the more so since many of these ideas have far from vanished from the European stage. Interesting suggestions are being made for adopting various elements of the European Constitution without formal Treaty amendment. There is, for instance, movement on the Subsidiarity Protocol, notably to install the proposed mechanism for supervision of subsidiarity by national parliaments.² Furthermore, some elements of the Constitution have meanwhile received implementation through ordinary means, such as the public nature of meetings of the Council³ and the power of the European Parliament to block decisions taken under Comitology.⁴ Similar suggestions have been made as regards the post of minister of foreign affairs of the EU, which could supposedly be created within the existing Treaty structure as well.⁵

This so-called “cherry-picking” of the Constitution has also been suggested as a way to resolve the current constitutional crisis. Elimination or dissociation of disputed parts of the Constitution and submission of a new, trimmed constitutional document – whether or not labelled “constitution” – may persuade reluctant Member States to ratify vital parts of the European Constitution still. The French candidate for President, *Nicolas Sarkozy*, for one, suggested the idea of drafting a new Treaty that is limited to the “institutional” provisions and subject to parliamentary ratification only. The former President of the European Convention, *Valéry Giscard d’Estaing*, proposed to dissociate the first and second parts of the European Constitution (which will be ratified via a referendum in the countries having chosen such a procedure) from the third part which would be ratified, after the appropriate changes, through a parliamentary procedure.

Perhaps more importantly, the European Court of Justice has, since the electoral debacle of the European Constitution, passed two judgments (in the *Pupino*

2 In its London XXXIV meeting of 09.–11.10. 2005 the Conference of Community and European Affairs Committees of Parliaments of the European Union (COSAC) decided that those National Parliaments that choose to do so can in future conduct a subsidiarity and proportionality check on a forthcoming EU legislative proposal or proposals, developing their existing scrutiny role as foreseen in the annex to the Treaty establishing a Constitution for Europe.

3 See *Council of the European Union*: Improving openness and transparency in the Council, 15834/05 of 21. 12. 2005.

4 Council Decision 2006/512/EC of 17. 07. 2006 amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, OJEU No. L 200/11 of 22. 07. 2006; reflecting Article I-36 Section 2 European Constitution.

5 See EU Observer of 06. 03. 2006.

and *Environmental criminal law*-cases) with broad implications and a remarkable resemblance to elements of the European Constitution.⁶ To symbolise this ongoing relevance of the European Constitution in the face of misfortune, we have chosen to refer to it in the present tense.

In this contribution we want to explore the relation between the European and national constitutions and, in line with this, how the balance of power between EU institutions and Member States has been realised. Our survey is limited by the span of our – local – expertise, and the span of this paper. We will predominantly take the constitutional law point of view in addressing the questions. And although the research is not strictly confined to the Dutch case, the Dutch constitutional system will often be used as an illustration throughout our excursion.

To start off the survey we will deal with the question whether the European Constitution is a true constitution (section II.), subsequently examine whether and how the European Constitution takes account of national constitutions (section III.), what the relationship is between the European and the national constitutions (section IV.), and how the European Constitution will shape the balance of powers between the European institutions and the Member States (section V.).

II. Is the European Constitution Actually a Constitution?

Before we can start our tour, an important preliminary question is whether the European Constitution is actually a constitution. That question has been raised more and more in the Netherlands, signalling and voicing the popular concern about being overtaken by a powerful European Federation. The counter-question is of course: what exactly does one mean by a “constitution”? In the Netherlands a “constitution” is generally understood as the system of fundamental rules establishing (state) institutions, public bodies, their mutual relations as well as the rules which determine under which conditions those bodies are authorised to perform (legal) acts (including the control mechanisms which ensure that the rules will be enforced and the limits that have been drawn will be complied with).⁷

6 The *Pupino*-judgment (ECJ, judgement of 16. 06. 2005, case C-105/03 (*Pupino*), rec. 2005, I-5285) is in line with the envisaged abolishment of the pillar structure of the EU, because it strongly reinforces the legal effects of Framework Decisions under the Third Pillar. The judgment in the *Environmental criminal law*-case (ECJ, judgement of 13. 09. 2005, case C-176/03 (Commission/Council), rec. 2005, I-7879) opens the possibility of harmonising criminal law within the *aquis communautaire* in a way that resembles the proposed Article III-271 Section 2 European Constitution.

7 This view is for instance reflected in a popular Dutch handbook on constitutional law (*Burkens, M. C. et al.* (eds.): *Beginnelsen van de democratische rechtsstaat*, Deventer, 2006, 44).

In short it concerns the basic rules of play of the organisation and functioning of a *state*. In this concept of “constitution”, there is a close connection between *constitution* and *state*. According to some a state is a definite prerequisite for the existence of any constitution: no state, no constitution.⁸ *Ergo*: in the absence of an underlying state the European Constitution cannot be called a real constitution. This was the view the signatories to the Dutch parliamentary motion *Herben* took in early 2004 when they asked the government no longer to use the term “constitution” for the European Constitutional Treaty, in order to avoid confusion.⁹ Others argue that the European Constitution cannot be a constitution since it is laid down in a treaty. This very formal reasoning already fails to convince since many confederal constitutions and even a few federal ones have been concluded in a treaty.

For a more in-depth analysis as regards the question whether or not the European Constitution is a constitution, a somewhat broader perspective is helpful. In modern constitutional literature the concept of constitution is generally used in three meanings. In its first meaning, the constitution is seen as an *act of establishment*. In this view the constitution is a legal act establishing a constitutional order. This could be called a formal concept of constitution,¹⁰ which originates in 19th century legal thought. In a second meaning constitution is also perceived as a system of rules aimed at the *limitation of government power*. According to this functional view a constitution aims in particular at the attribution and limitation of government powers, the regulation and limitation of the public exercise of power. “Constitution” in this meaning is closely related to the central tenets of constitutionalism. In a third view, which is sometimes referred to as the political concept of constitution, a constitution is *exclusively bound up with the national state*. This perception is closely related to the idea of popular sovereignty. According to this latter widespread view a constitution is in particular a political act: an expression of the will of a sovereign people or nation to manifest itself as an independent political entity (self-determination) and to organise itself for this purpose as a state (constitutional autonomy). According to this line of reasoning a constitution not merely presupposes a state (in short: territory, population,

8 Geelhoed calls this the formal dogmatic state-oriented view of the concept of constitution which is advocated by some in the German constitutional doctrine, he cites *Pache* and *Pernice* as examples (Geelhoed, L. A.: Een Europawijde Europese Unie: een grondwet zonder staat?, in: SEW. Tijdschrift voor Europees en economisch recht, 51/9 (2003), 284–310, here 288).

9 See *Tweede Kamer der Staten-Generaal, vergaderjaar 2003–2004*: Europese Raad, 21501–20, no. 242 of 31. 03. 2004.

10 Barents, R.: Hoe constitutioneel is de Grondwet voor Europa?, in: SEW. Tijdschrift voor Europees en economisch recht, 52/1 (2004), 2–17.

effective exercise of authority), but a state which is the expression of the will of a nation or people which wants to unite and organise itself into a state. This politically normative view of the concept of constitution is perhaps most eloquently expressed in the preamble to the US Constitution.¹¹ Not surprisingly, this view is very common in the United States, where the US Constitution and the US constitutional system are quite commonly perceived as the gold standard of good constitutional practice. It is against that background that *Weiler's* comments on the European Constitution may perhaps be understood: "If a 'constitution' by anything other than a European constituent power," he notes, "it will be a treaty masquerading as a constitution."¹² However, the latter view is put into perspective by less fervent believers: The role of the state as the unique source and legitimisation of law is questioned widely nowadays¹³ and the phenomenon of post- or extranational constitutionalism challenges the idea of state monopoly on lawmaking.¹⁴

It is clear from all this that the concept of constitution does not have a unique meaning. Set along the measuring rod of the existing concepts it emerges that the European Constitution is both in the first and the second meaning of the concept a fully-fledged constitution.¹⁵ In addition it may well be argued that notably the EC already exists in "constitutional" form, even without a written source of that name.

III. Reference to National Constitutions in the European Constitution

How does the European Constitution relate to national constitutions? A first step on that road is to look whether national constitutions are mentioned in the European Constitution. In a number of cases the European Constitution does indeed mention national constitutions. For instance, Article I-5 refers directly to them by stating that the Union will respect the equality of Member States before the Constitution as well as their national identities, inherent in their fundamental structures, political and *constitutional*. Article I-6 ensures the primacy of the law of the

11 *Weiler, J. H. H.*: In Defence of the Status quo: Europe's Constitutional Sonderweg, in: id./Wind, M. (eds.): *European Constitutionalism Beyond the State*, Cambridge, 2003, 7–23.

12 *Ibid.*

13 For an overview see *van Bijsterveld, S.*: *The Empty Throne. Democracy and the Rule of Law in Transition*, Utrecht, 2002, 14, 20 ff.

14 *Walker, N.*: Postnational Constitutionalism and the Problem of Translation, in: *Weiler, J. H. H./Wind, M.* (eds.), *op. cit.*, 27–54.

15 *Barents, R.*: *Een grondwet voor Europa*, Deventer, 2005, 212.

Union, but does not say anything about the national constitutions. However, Article II-113 explicitly refers to such constitutions. The article provides that the fundamental rights from Part II of the European Constitution must not be interpreted as restricting fundamental freedoms included in *national constitutions*.¹⁶ The European Constitution further contains a number of references to national constitutions within the framework of the national ratification of EU decisions or agreements. Article I-41, for instance, calls on the Member States – in case a common defence policy will be established – to take a national decision in accordance with their constitutional provisions in order that this common defence policy can be implemented. Of course it will depend on the national provisions whether or not this must be done in the form of ratification. Article I-54 also anticipates such a possibility: if a draft European law lays down provisions relating to the own resources of the Union that have the possible consequence of creating new categories of resources, such a law will have to be approved in accordance with the national constitutional provisions. Article I-58 provides that accession agreements with new Member States must be ratified by all Member States, in accordance with their constitutions. Withdrawal too (Article I-60) can only be effected in accordance with the constitutional provisions of a Member State.

The possible extension of the citizenship rights of Article I-10 must also be approved by the Member States according to their own constitutional rules, as must adjustments by European law laying down rules for the election of members of the European Parliament, amendments to the European Constitution, revisions of the internal policy and of action of the Union. Finally the European Constitution itself must also be ratified (Article IV-447). Even though in the rest of the text the European Constitution frequently refers to itself, there are no further references to national constitutions.

IV. Relation between European Constitution and National Constitutions

At this instance, with a difficult ratification process either having come to a grinding halt or still being underway in some Member States, the national constitutions are obviously very important. But this is no surprise, bearing in mind that the adoption of the European Constitution is formally still to be seen as the adop-

¹⁶ This is a rather common provision in human rights treaties. As examples see Article 5 International Convention on Civil and Political Rights and Article 53 European Convention on Human Rights and Fundamental Freedoms.

tion of a treaty. A wholly different matter is to what degree the national constitutions will be of importance in the actual operation of the European Constitution, once it is adopted. The fact that it has been interpreted as a fully-fledged constitution already suggests that the role of national constitutions will be secondary. As we have seen, the European Constitution grants the national constitutions various points of impact. Most notably, there is the simplified revision procedure of Article IV-445 which allows for the revision of Title III of Part III – the legal bases for Union action – without convening an IGC, but which retains the demand of ratification in accordance with the national constitutions, just as the ordinary revision procedure of Article IV-443 does. The national constitutions also remain important in more general respects. The European Constitution will not radically change the existing state of affairs in which the prime responsibility for the implementation of Union law rests on the Member States and the authorities therein. It is a matter of dispute to what extent these national authorities can still be understood as national authorities in their role as a European executive. Common parlance has long been that national authorities are to be seen as Union authorities when in pursuit of Union objectives. It is clear that national (constitutional) law must grant these national authorities the adequate means to fulfil this responsibility in order not to be in breach of EU-law, notably the principle of sincere cooperation (Article 10 TEC). In addition to Article I-5(2) – the principle of sincere cooperation – the European Constitution will also formalise the obligation to enact all necessary measures to implement legally binding Union acts (Article I-37). But, on the other hand, it is equally clear that EU-law will not fill in the exact statute and competences of these national authorities itself. In other words, one could say that even after the adoption of the European Constitution, the complex landscape that *Pernice* has coined “multilevel constitutionalism” remains.¹⁷

The question of the continued importance of the national constitutions can also be asked in a more – dare we say – metaphysical way. This is the question of the ultimate source of public authority. It is not uncommon in the constitutionalist tradition – notably in what we have identified as the formal conception of the constitution – to postulate that all public authority emanates from the national constitution.¹⁸ This postulate logically precludes that any transfer of sover-

17 *Pernice, I.*: Multilevel constitutionalism in the European Union, in: *European Law Review*, 27/5 (2002), 511–529.

18 For an example of this rationale see, apart from the famous *Maastricht-Urteil* of the German *Bundesverfassungsgericht*, its recent judgment about the reception of the law of the European Convention of Human Rights in the German legal order: *Bundesverfassungsgericht*, judgement of 14.10.2004, 2 BvR 1481/04.

eighty has irreversible effects. Set alongside the doctrines on the nature of the European legal order that the ECJ has long promoted, this particular constitutional rationale seems in direct contradiction, notably with the continuous case-law of the ECJ concerning the subordination of all national law, including constitutional law¹⁹, to the (goals of the) EU legal order. There is no legal solution to the contradiction that can thus be constructed from the perspective of some of the Member States' constitutions (notably Germany).²⁰ The European Constitution does not alter this situation; rather it reemphasises the superiority of the EU legal order. The most important article is undoubtedly Article I-6 which provides that the Constitution and the other law of the European Union will have primacy over the law of the Member States. As has been shown, this provision may be troublesome for certain Member States because of the nature of their national constitutions.²¹ For the Netherlands it does not entail any special problems, since it has long been established that both Primary and Secondary Community Law has independent (by virtue of its autonomous nature) binding force in the Dutch legal order, regardless of the Dutch Constitution.²²

In addition to the *primacy rule* mentioned the principle of the *institutional balance* is also important for the relation between the European and the Dutch constitutional order. The principle of institutional balance implies that powers cannot be exclusively exercised by one body, but always by several cooperating bodies, in order to avoid abuse of power and arbitrariness.²³ This form of distribution of powers somewhat resembles the system of "checks and balances", although it cannot be identified with it. As a Community principle – derived from the system of the Treaty – institutional balance does not in the first place govern

19 Already apparent in ECJ, judgement of 17.12.1970, case C-11/70 (*Internationale Handelsgesellschaft mbH/Einfuhr- und Vorratsstelle für Getreide und Futtermittel*), rec. 1970, 1125.

20 La Torre, M.: Legal Pluralism as an Evolutionary Achievement of European Community Law, in: Snyder, F. (ed.): *The Europeanisation of Law: The Legal Effects of European Integration*, Oxford, 2000, 125–138.

21 Certainly in those countries which have as basic principle that the national constitution is the foundation for the validity of all law in the national legal order. For an overview of such countries (Belgium, Luxembourg, Spain, Greece, Germany, Italy, Sweden and Denmark, each of them in different modalities) see Kortmann, C. A. J. M.: *Secundair gemeenschapsrecht en de nationale constitutie*, in: SEW. Tijdschrift voor Europees en economisch recht, 47/3 (1999), 82–88. For a very extensive discussion about the nature of the Community legal order and its relation to the legal orders of the Member States under the old Treaties, see Barents, R.: *De communautaire rechtsorde*, Deventer, 2000 and Claes, M.: *The National Courts' Mandate in the European Constitution*, Oxford/Portland, 2006.

22 Articles 93 and 94 Dutch Constitution establish a (monistic) system in which provisions of treaties and of resolutions by international institutions (like the EU), which may be binding on all persons by virtue of their contents, are in fact directly binding on everyone in the Netherlands once they have been published. Such provisions are not only directly binding, they also have precedence over national Dutch law.

23 Barents, R.: *Een grondwet*, op. cit., 375.

the relation between the traditional government powers we know from the *Trias Politica*, but in the context of the Community it governs in particular the relation between, and especially the respective prerogatives of, the legislating and policy-making Community institutions. The practical effect of the principle – as developed in case law²⁴ – is that when exercising their respective powers, each of these Community institutions depends on the cooperation of another institution, be it by way of codecision, supervision or answerability. The Council cannot legislate without an initiative of the Commission, the Parliament cannot legislate without an initiative of the Commission and the cooperation of the Council, the Commission is answerable to Parliament. Member States implement Union law and policies under supervision of the Commission, etc. Even though the principle of institutional balance is solely concerned with the relationships between the legislative and policy-making Community institutions, it is in some way relevant for the relationships *vis-à-vis* the Member States insofar as it protects the prerogatives of the institutions, which can either be typified as intergovernmental (Council, European Council) or communitarian (Commission, Parliament, ECB etc.).²⁵ Therefore shifts in the institutional balance have immediate repercussions for the balance of power of e.g. large and small Member States.²⁶ The principle of subsidiarity to some extent expresses the same underlying principle as institutional balance.

Over the years the system of institutional balance has penetrated ever deeper into the constitutional fabric of the European Community and later of the European Union²⁷ and now seems to have – as a kind of blueprint standard²⁸ – obtained a firm footing in the European Constitution.²⁹ Institutional balance was a

24 Prechal, S.: Institutional Balance: A Fragile Principle with Uncertain Contents, in: Heukels, T./Blokker, N./Brus, M. (eds.): *The European Union after Amsterdam*, The Hague, 1998, 273–294.

25 However, it is uncommon that the prerogatives of the Council have to be protected *vis-à-vis* the other institutions. Commonly, it is the other way around. See, e.g. ECJ, judgement of 13. 07. 2004, case C-27/04 (Commission/Council), rec. 2004, I-6649.

26 Barents, R.: *Een grondwet*, op. cit., 371.

27 Mainly the First Pillar.

28 Just as in many other constitutions, the principle has not been laid down as a standard, but it has been a guiding principle in organising the relation and the attribution of the powers to the various bodies.

29 Barents draws attention to two fundamental – sometimes opposing – changes which the system of the institutional balance has undergone on EC level in the course of time. The first development is: *inter-governmentalisation* (to be inferred from the rise of the European Council and comitology) and the second *parliamentarisation* (the rise of influence of the European parliament). That development has not yet ended. Although in 1999 by the amendment of the Comitology resolution (Council Decision 1999/468/EC of 28. 06. 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, OJEU no. L 184/23 of 17. 07. 1999) and now also in the European Constitution it has been tried to slightly break the hold which the Member States have on delegated legislation and implementation rules by the Commission by bringing certain implementation rules more under the control of the Euro-

very prominent catch-phrase in the discussions in the Convention. On the other hand, one could wonder whether the evasive political notion of institutional balance is actually the same as the judicial version.³⁰ The principle of institutional balance has a more restricted meaning in the case-law of the EC Court of Justice, even though it originally comes from that source. The Court seems to be reluctant to read an over-arching principle of separation of powers into the Treaties,³¹ simply because the Treaties themselves are ambiguous in this respect. Still, we contend that an over-arching principle of separation of powers is gradually taking shape to such a degree that one can speak of a “blueprint standard”. In the European Constitution the scope of the principle no longer seems to be exclusively reserved to the relation between legislator and executive or administration (which because of their close connection are nowadays sometimes seen as a sort of one joint government power),³² but also regards the relation of the latter two to the judiciary. Although the European judiciary (i.e. at the Union level primarily the Court of Justice of the European Union)³³ (see Article I-29) is independent, the judges are appointed by the Member States for only six years. The concept of institutional balance presents itself in the new constitutional system by the very fact that courts in the Member States are not subordinate to the EC Court of Justice, but independently apply Community law, without the possibility of a European appeal, all this within the framework of a cooperative system (i.e. the system of the preliminary rulings). Furthermore, the EC Court of Justice can rule on the legality of (legislative) acts of the institutions (see Article III-369), in an (increasing) number of cases even in response to an appeal by an individual citizen (see Article III-365). But this is running ahead of things.

pean Parliament, the question is whether the Parliament will succeed in actually effecting such control by the constitutionally introduced difference between delegated regulations and implementation rules (Articles I-36 and I-37). The limits between regulation (Art. I-36) and implementation (Article I-37) have not been drawn very sharply. See also *Verhoeven, A.*: Democratie in het recht van de Europese Unie: een tussenstand na de Europese conventie, in: Adams, M./Popelier, P. (eds.): *Recht en democratie*, Antwerp et al., 2004, 625–627.

30 Griffioen, H. M./Ten Napel, H. -M. Th. D./Voermans, W. J. M.: “Ships that pass in the night”: over de juridische en politieke dimensies van het beginsel van institutioneel evenwicht, in: Heldeweg, M. A. (ed.): *Rechtsvorming en Governance*, Alphen aan den Rijn, 2005, 75–102.

31 See, for instance, ECJ, judgement of 06. 07. 1982, cases C-188–190/80 (France, Italy and United Kingdom/Commission), rec. 1982, 2545. The response of the Court to the contention that the Commission cannot be understood to have original legislative powers because of the idea of separation of powers marks the Court’s reluctance towards an over-arching idea of separation of powers: “the limits of the powers conferred on the commission by a specific provision of the treaty are to be inferred not from a general principle, but from an interpretation of the particular wording of the provision in question [...]” (§ 6).

32 Koopmans, T.: *Courts and Political Institutions. A Comparative View*, Cambridge, 2003, 247 ff.

33 Member state judges have to apply community law as well and constitute – in that sense – a part of the European Union judiciary as well. Their constitutional position however is largely governed by national constitutional law.

For where do we find true and direct evidence of that model of institutional balance in the European Constitution? It manifests itself, insofar as we can see, on the two axes of the constitutional structure of the Union: the vertical axis (i.e. the relation between the European institutions and the Member States) and the horizontal axis (relation between the European institutions themselves).

V. Balance of Powers under the European Constitution

1. Institutional Balance on the Vertical Axis

The principle of institutional balance is, in the form in which it has been crafted by the ECJ, concerned with the delimitation of the powers of the institutions of the European Union. One should, in this context, not read “delimitation of powers” with the connotation of the traditional separation of powers into the legislative, the executive and the judiciary. It is generally acknowledged that the EC/EU legal order fails to correspond with this traditional theory.³⁴ The delimitation which the ECJ has brought about has a far more detailed meaning. The ECJ has sought to guarantee the prerogatives of the institutions *vis-à-vis* each other. However, the prerogatives of the institutions vary greatly, depending on the specific legal basis of the measure in question. As a result of this fragmentation of different legal bases, there is no single conception of the relations between the institutions inherent in the Treaties. At the same time, the complexity of the legal bases and the legal instruments of the EC/EU has been one of the reasons for convening the Convention on the Future of Europe, as is apparent from the Laeken Declaration. Two of the objectives of the constitutional project were to rethink the division of competences between the Union and the Member States, and to strive for simplification of the instruments of the Union. On the theme of institutional balance, these two strands come together, because it is the complexity of the system of legal bases that has caused the division of competences to become ever more opaque, provoking even the European Council of Laeken to use the somewhat paranoid notion of “creeping expansion” of competences. However, it soon became apparent in the Convention that the rethinking of the division of competences would wield neither a substantial shift of competences nor even a different model, but rather would affirm the case-law of the ECJ on this matter and

³⁴ See *Lenaerts, K.*: Some Reflections on the Separation of Powers in the European Community, in: *Common Market Law Review*, 28/1 (1991), 11–35; *van Bijsterveld, S.*, op. cit.

strive at elucidation only.³⁵ The passages of the European Constitution about the division of competences will be discussed below. At face value, the Constitution will change little with respect to the fundamental principles of the division of competences, when compared to the current situation. However, we will take the perspective of the institutional balance in a broader sense, and assess whether there may be broader implications for the horizontal and vertical division of competences than may at first be perceived.

Under the European Constitution, the demarcation of powers between the Member States on the one hand and the Union on the other hand is governed by the principle of conferral. That is to say that the Union can only exercise the powers that have been expressly granted to it by the Constitution. This exercise of powers will in turn be governed by the principles of subsidiarity and proportionality (see Article I-11). The principle of conferral – an expression of the notion of legality³⁶ – is of a fundamental nature: neither the Union, nor its institutions can act if such authority has not been granted to them either directly or indirectly by the Constitution. It is difficult to reconcile this principle with the phenomena of implied powers and flexibility clauses,³⁷ for it implies that if the Constitution fails to allocate a power, the Member States are still competent, as Article I-11(2) now expressly states. The existence of the principle of conferral – otherwise known as the principle of attributed competences – is quite obvious from the standpoint of the law of international organisations. It is, however, open to debate whether this principle has a substantial meaning in the context of the EC/EU and under the European Constitution. After all, the abovementioned “creeping expansion” of competences has not been hindered by the operation of this principle, which has been in place since the outset of the E(E)C.³⁸ It is no coincidence that in legal writing it has already been *en vogue* for some time to characterise the European legal order as *constitutional*. The fact that the EC/EU legal order can be perceived as constitutional has a lot to do with the perception that the current EC/EU has an autonomous thrust that goes much further than the explicit provisions of the Treaties. In part, this can be explained from the specific nature of the central

³⁵ *Barents, R.*: Een grondwet, op. cit., 255.

³⁶ For a detailed analysis see *Triantafyllou, D.*: Vom Vertrags- und Gesetzesvorbehalt. Beitrag zum positiven Rechtmäßigkeitsprinzip in der EG, Baden-Baden, 1999.

³⁷ The flexibility clause of Article I-18 gives a procedure in case of (power) gaps in the Constitution. In that case on a proposal of the Commission and after obtaining the consent of the European Parliament the Council may unanimously adopt appropriate measures. So, in that way new powers may be created. This is actually inconsistent. The limitations which Article IV-445 imposes (no new powers via the simplified revision procedure) are circumvented in that way. See *Barents, R.*: Een grondwet, op. cit., 274 ff.

³⁸ *Krauß, H.-P.*: Das Prinzip begrenzter Ermächtigung im Gemeinschaftsrecht als Strukturprinzip des EWG-Vertrages, Berlin, 1991.

tenets of economic integration: the directly applicable prohibitions to hinder the freedom of movement (of capital, workers, goods, and services). These provisions serve to protect the internal market; but their uniqueness lies in the fact that they touch on every conceivable field of social activity. They function so to speak horizontally, cutting through all fields of government regulation.³⁹ For example: when the national authorities grant permission for a demonstration on a principal highway, this can be a breach of the free movement of goods.⁴⁰ That is why it is virtually impossible to point out a field of regulation which is kept wholly untouched by EC law. The ECJ has accommodated the spreading out of EC-competences along these lines.⁴¹ Apart from these very general and far-reaching provisions there are many more concrete provisions (i.e. legal bases) that concern specific competences in specific fields. The discrepancy between these different forms of competence leads *Barents* to state that the law of the Union is also relevant in fields in which the Union has no competences. This is most likely to be the background of *Lenaerts'* famous statement that “[t]here is simply no nucleus of sovereignty that the Member States can invoke, as such, against the Community”.⁴² The European Constitution will change little in this respect.

What the European Constitution does do is elucidate the different kinds of competence, as they have evolved from the case-law of the ECJ. In this connection the European Constitution contains four kinds of powers, viz:

- *exclusive competence*, which implies that in such areas only the Union can act as legislator and adopt legal acts, and that the Member States are no longer allowed to take any action, unless it concerns the implementation of Community policy or unless they have been explicitly authorised by the Union;
- *shared (or competing) competence*, implying that both the Union and the Member States can act in such areas, so long as the Union has at any rate not exercised its power, for in that case the competence of the Member States will cease;
- *coordinating competence*, which means that the Union is authorised to coordinate parts of the economic policy and the employment and social policy of the Member States via the adoption of (global) guidelines in the Council of Ministers; and

39 *Nettesheim, M.*: Kompetenzen, in: Bogdandy, A. v. (ed.): *Europäisches Verfassungsrecht. Theoretische und dogmatische Grundzüge*, Berlin, 2003, 415–477.

40 ECJ, judgement of 12. 06. 2003, case C-112/00 (*Schmidberger*), rec. 2003, I-5659.

41 *Kranenborg, H.*: HvJ EG 6 november 2003, Bodil Lindqvist (C-101/01), in: NJCM-bulletin, 29/3 (2004), 415–425.

42 *Lenaerts, K.*: Constitutionalism and the Many Faces of Federalism, in: *American Journal of Comparative Law*, 38/2 (1990), 204–263, here 220.

- *supporting (supplementary) competence*, which implies that, if the need for this exists, the Union can supplement, coordinate or support the action of the Member States in a certain area, as regards the European dimension, however without taking over the competence of the Member States in that area.

From this list only the exclusive competences fall outside the scope of application of the subsidiarity principle. As regards the exercise of all other powers, the rule applies that the Union will not make use of its powers if the Member States themselves are better able to achieve the goals associated with the action. Furthermore, Union action must have added value regarding the scope or the consequences of the intended action. Union action must not go further than necessary to attain the objectives set out in the Constitution, according to Article I-11. It can be said that none of the provisions of Title V of Part I (“Exercise of Union competence”) change anything in the EC/EU law, because they contain no specific bases of competence but only common principles which have already been expounded by the ECJ. The concrete bases for lawful action are situated in Part III of the European Constitution.

The principle of institutional balance has also been incorporated into the way in which the Member States participate in the decision-making. At various places in the Constitution – the proportion of votes in the Council and European Council (see in particular the hard-won Article I-25), and the composition of the Commission – a fair balance between the interests of the large and small Member States has been aimed at. The experiences with the Treaty of Nice have taught that effectiveness and fair balance may be incompatible. The balance achieved by the European Constitution concerning decision-making with a qualified majority is a provisional compromise with a combination of old-style majority decision-making, and the variables of the number of Member States voting in favour (at least 55 percent), their spread and representation (at least 15 Member States), and the size of the population (at least 65 percent of the population of the Union).

Barents rightly points out that the principle of institutional balance is a dynamic principle.⁴³ That also applies to its result. The question is therefore also whether it has been sensible to lay down the calculation rules for a qualified majority in the European Constitution. After all Part I cannot be amended just like that if the Member States wished to do so. The major convention method of Article I-443 will then have to be followed. Has the proportion of votes – chosen under pressure and without having any experience with it – in this way not been sculptured too much in constitutional marble – or even granite? As far as we are

43 *Barents, R.*: Een grondwet, op. cit., 378.

concerned, Article III-432 has been put together in a constitutionally more sensible way – on an equally controversial point: the seat of the European Union.

The preoccupation with balance on the vertical axis can also be found in the share which the national parliaments have in safeguarding the principles of subsidiarity and proportionality under the European Constitution. The Protocol on the Role of National Parliaments in the European Union gives the parliaments of the Member States the power to raise a red flag (give a reasoned opinion) in case draft legislation of the Commission supposedly exceeds the limits of subsidiarity and proportionality. If one third of the Member State parliaments conclude that such limits have been exceeded, the Commission must reconsider the proposal.⁴⁴ If we reflect on this, about nine national parliaments must – within a period of six weeks – advise negatively for a proposal to be halted. Bearing in mind the general lack of interest of national parliaments in detailed European files (such as many legislative proposals) and the very hesitant and limited communication among these parliaments, this will not be a guaranteed success. Even in the case of the very controversial Services Directive⁴⁵ the discussion in the Member States has only gotten underway long after the six week period had passed.

In Europe institutional balance on the vertical axis is also aimed at by assigning the processes of policy preparation and policy adoption to the European institutions and implementation of the policy to the Member States. The European Commission then monitors the implementation.⁴⁶ This system did not always turn out to be effective in the past decades. The policy process is too one-dimensional and problems in the implementation practice are insufficiently related back and therefore insufficiently recognised and dealt with. Consequently there are also hidden losses.⁴⁷ One of the remedies which the European Constitution employs against this is the possibility to let the Commission direct the implementation by Member States by adopting uniform rules.⁴⁸ Outside the Constitution the Union tries to keep a closer watch on the implementation by the Member States by the formation of European agencies, which also monitor the application of EC law.

44 See Article 7 of the Protocol on the application of the principles of subsidiarity and proportionality.

45 Directive 2006/123/EC of the European Parliament and of the Council of 12. 12. 2006 on services in the internal market, OJEU no. L 276/36 of 27. 12. 2006.

46 In the EC Treaty this is called supervision on the “application”. For this task of the Commission see Article 211 TEC and Article I-26 European Constitution.

47 Voermans, W. J. M. et al. (eds.): *Quality and Enforcement*, Tilburg/The Hague, 2000.

48 See Article I-37 European Constitution.

2. Institutional Balance on the Horizontal Axis

We shall be brief about the relations between the EU institutions on the horizontal level. It is important to note here that the European Constitution makes, more than was the case in the Treaties preceding it, a distinction between the government functions of legislation, administration and dispensation of justice. Eyes that must get used to Brussels light will have to blink a few times, but the leverage point for the separation between the functions of legislation and administration can be found in Articles I-35 to I-37. In those articles a distinction is made between legislative acts and implementing (or: non-legislative) acts. The legislative function is exercised via so-called legislative acts. In that connection the European Constitution contains a strictly formal concept of legislation: i.e. legislative acts consist of the process which – according to the procedure of Article III-396 or according to a specific procedure – leads to the adoption of European laws or European framework laws. In this European legislative process laws and framework laws are adopted by the Council and the European Parliament on a proposal of the Commission. The Commission here has the exclusive right of initiative. Council and Parliament cannot take the initiative – apart from a few small exceptions⁴⁹ –, but only propose amendments. The Constitution does not set any requirements as regards the substance of European laws and framework laws. There is no constitutional obstacle for a European framework law containing standards that are addressed to only one actor in an individual Member State. An administrative decision in the form of a European law is – in principle – conceivable. Neither does the Constitution set requirements as regards the substance of delegated “legislation” by virtue of Article I-36. If the European (framework) legislator has delegated a regulatory power, and that power is used, the result will be something which would be very confusing for most continental constitutional lawyers, especially the Dutch ones. That result is actually called a delegated regulation, which in the system of the European Constitution is a non-legislative act, yet which may contain universally binding provisions, and is in principle also an administrative decision.⁵⁰ Matters become yet more complex if we consider that under the European Constitution there can be three kinds of regulation: the organic-law regulation (directly based on the Constitution), the delegated regulation (by virtue of Article I-36) and the implementing regulation (by virtue of Article I-37).⁵¹

⁴⁹ See Article I-34(3) European Constitution.

⁵⁰ We expressly speak here of an “administrative decision” since “decision” proper will cause confusion, for Article I-35 also contains the category of decisions.

⁵¹ Voermans, W.J.M.: *Besluiten onder de Europese Grondwet*, in: *Ars Aequi*, 54/2 (2005), 63–70.

As in the old system, under the European Constitution it is not easy to determine who is charged with the government function of administration. The opinions about this also differ.⁵² In any case Article I-37 instructs Member States to implement legally binding Union acts. The Member States will adopt “all measures of national law” necessary for this. This points to a strongly legal bias for the function of administration.⁵³ However if we read that provision in conjunction with Article I-5 (2), in which the loyalty to the Community – the principle of sincere cooperation – has been laid down, it can be inferred from it that “implementing” does not stop at taking legal measures, but includes more. So in principle the Member States are charged with the European administration, unless the Commission is charged with it by primary or secondary Union law (e.g. supervision). The Minister of Foreign Affairs of the Union and, as the occasion arises, European agencies can also be charged with the implementation of Union law.

A striking feature is that the functions of legislation and administration are strongly interwoven and have been made interdependent. The implementers (the Member States) sit at the table when the decisions are adopted which they themselves have to implement, but in order to ensure that when doing so they will not lose sight of the European interest, they have no right of initiative and the Commission supervises their implementation. The Commission is in turn accountable to the European Parliament and also requires the confidence of that forum. And there are numerous more specific mutual connections like that. Never one cheek by one jowl, but often one cheek by two or three jowls.

The function of dispensing justice is somewhat more separated. The function of dispensing justice is exercised by the judiciary of the Union (consisting of the Court of Justice, the Court of First Instance, specialised courts and courts in the Member States). The function of dispensing justice can only partly be found in Article III-365, which instructs the Court of Justice to review the legality of the acts of the European institutions. The fact that judges in the Member States must apply Union law and must adjudicate disputes arising from Union law has nowhere been codified, but has been implied.⁵⁴ Within the framework of the institutional balance – we will also involve the judiciary in this, although that is not yet common – it is important to see that the European judiciary is a subtle collaborative arrangement of courts of Member States and of the Union. The Court

⁵² Verhoeven, A., op. cit., 624.

⁵³ It is neither compatible with our Dutch concept of “administration” in which we understand administering as a residual function, i.e. all the government functions minus legislation and dispensation of justice. The European Constitution expressly mentions the function of “implementation”.

⁵⁴ One could say that it is included in the principle of sincere cooperation under Article I-5 European Constitution.

of Justice is independent, but the judges – one from every Member State – have a term of office of only six years. Moreover, they are appointed by mutual agreement between the Member States. The judges in the Court of First Instance also have a limited term of office. This rapid rotation is a good counterpart for the important powers which the Court has in reviewing the acts of the Member States and the EU institutions – including the legislative acts.

There is still much more that can be said about the way in which the checks and balances in the European Constitution have been organised, but for the survey carried out here it is relevant that we can establish that the principle of institutional balance has deeply penetrated into the fabric of the European constitutional system. According to the precepts of institutional balance, the European government functions on the horizontal level are always exercised by segmented bodies which must cooperate in order to arrive at policy or at decisions. Policy-making and decision-making therefore almost necessarily take place along the lines of the consensus model instead of the majority model. The new decision-making procedures as such cannot much alter that situation.

VI. Enfin

The no-vote in the Dutch referendum caught most observers by surprise. The Netherlands were until recently renowned for their Euro-enthusiasm. Now they are suddenly in a position, together with the French, of having stopped the European Constitution in its tracks, and causing a crippling crisis. The final analysis of the Dutch “no” must still be made, but it appears that a combination of a long standing culture of political neglect of EU issues, a general lack of trust in the government and the dynamics of a nation-wide referendum⁵⁵ – 207 years after the last “real” constitutional referendum⁵⁶ – have created an unique set of circum-

55 In the Netherlands ratification of treaties is actually the province of Parliament, see Article 91 Dutch Constitution. In this exceptional case it was decided to organise a consultative national referendum. A nation-wide referendum is an odd bird in the Dutch constitutional system. There is no constitutional basis for it, and no experience with it. Four years ago an experimental law, enabling national referenda, was enacted. It expired on 01. 01. 2005. No national referendum was held during the time the experimental law was in force. In February 2005, a parliamentary *ad hoc*-initiative was launched to organise a one-time-only national referendum on the European Constitution. The referendum uses the procedure and institutions of the expired experimental referendum law.

56 In 1798, the draft of the Batave Constitution – a document deeply influenced by the ideas and principles of the French Revolution – was submitted to a national referendum. The voters turned the draft down.

stances.⁵⁷ This may also explain the paradoxical feat that in December 2004 73 % of the Dutch voters indicated that they were in favour of a European Constitution and in a poll held some weeks after the referendum (June 2005) the same voters were even more enthusiastic about the European Union and European integration than they were in 2004. As to the course of action after the “no”, the Dutch government is in dire straits. But a constitutional future for the EU, roughly along the lines of the European Constitution, is still very feasible, even for the Netherlands.⁵⁸ This in the first place because the present European Constitution consists for the most part of EC and EU law already in effect; the European Constitution is largely a recast of the existing Treaties and a codification of the case law of the European Court of Justice. The European Constitution enshrines the constitutional *aquis* of the Union. Secondly, the Court of Justice will, with or without the European Constitution, elaborate the EU’s constitutional *aquis* in its case law. It did so in the past and will do this in the future. The recent judgements in the *Pupino* and *Environmental criminal law*-cases (see the introduction) provide evidence for that position. Studying the impact of European constitutional law on national law and national constitutions – be it in or outside the wrapping of a European Constitution – is (still) highly relevant, especially where the Dutch referendum case shows that a lack of information or insight in the consequences of EU law can create a (contra-productive) awareness shock.

What can be learnt from the present survey into the relation between the European and the Member State Constitutions? In the first place it is evident that the European Constitution is a constitution which builds on the constitutional traditions of the Member States in more or less the same way as the American Constitution did in its time. And even though the word “federation” is under a taboo, the European Constitution is as much or as little a federation as the American federation was on 14 May 1787 in Philadelphia. The fact is that federations are not ordained by constitutions, but rather emanate from political and societal realities. The survey also illustrates that the European Constitution takes account of national constitutions, but even more of national constitutional systems. The constitutional system of the Union is interwoven with that of the Member States: the functions of legislation, administration and dispensation of justice are always exercised in joint productions of institutions of the Member States and the

57 Toonen, T. A. J./Steunenberg, B./Voermans, W. J. M.: Saying No to a European Constitution: Dutch Revolt, Enigma or Pragmatism?, in: ZSE 3/4 (2005), 594–619.

58 For the most recent development, see Coalitieakkoord tussen de Tweede Kamerfracties van CDA, PvdA and ChristenUnie of 07.02.2007, 13, which envisages a bundling of the present Treaties securing subsidiarity and democratic control but rejects the present Constitutional Treaty.

Union. In that sense the European Union is not a classical federal system, since the separation between what belongs to the federation and what to the Member States has not been implemented in a conventional way. Although the powers of the Union and the Member States have been delimited from each other, in the exercise of these powers there is close cooperation between institutions of the Union and of the Member States. In the third place, the system of European constitutional law, as it has now been codified to a large extent in the European Constitution, has led to a entwinement of mutual dependencies on the horizontal (between the EU institutions) and vertical level (between EU and Member States). The functions of legislation, administration and dispensation of justice – according to the blueprint standard of the institutional balance – have been made interdependent in order to achieve a balance of power. That is a new situation, for under the system of the EC and EU Treaties, those government functions could not so clearly be distinguished. The legislative function is distinctly new in the European Constitution.

New government functions come with new government powers in the European Constitution. This begs the question how and according to what norms and principles the mutual relations of the institutions of the EU are governed. One might argue that no other general principles or norms apply to this relation than can be found in the individual provisions of the Treaty, or – on the contrary – that fundamental constitutional principles derived from the concept of the rule of law or *Rechtsstaat* overarch the different Treaty provisions that govern relations between the individual institutions. We perceive the principle of the institutional balance (together with the principles of institutional autonomy and loyal cooperation) as the basic and underlying pattern of European distribution of power in the European Constitution. This enables not only a better understanding of the background and the system of the Constitution, but is also in line with the way the Court of Justice applies these principles. It is most likely that the Court will use this principle as a norm.⁵⁹ If an institution fails to take into account the prerogatives of another institution when exercising its powers, the decisions resulting from this can be declared null and void by the Court in appeal proceedings because of violation of the institutional balance. A possible important test case is the future of the comitology under the Constitution. Will it be resurrected under Article I-37, or under Article I-36 and would the Court of Justice be able to put a stop to it since Article I-37(2), one might argue, no longer leaves any room for it?⁶⁰

⁵⁹ *Barents, R.*: Een grondwet, op. cit., 378.

⁶⁰ If we may believe the documents of the Convention, it was not the intention that the comitology would continue to exist under Article I-37.

Or will, as is often the case, constitutional practice dictate the constitutional rule? If the Constitution will ever come about, the problem of the distribution and spread of power will become an interesting one.⁶¹ And the more so, if it does not come about.

⁶¹ In the Leiden research programme *Trias Europea* we study the question whether and to which extent the European Constitution will change the distribution of powers between the EU institutions themselves and their relation to the Member States. This contribution was also written within that framework.

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